

No. 137, Original

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In The
Supreme Court Of The United States
◆

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

Defendants.

◆

Before the Honorable Barton H. Thompson, Jr.
Special Master
◆

**MONTANA'S RESPONSE TO WYOMING'S COMMENTS ON THE SPECIAL
MASTER'S DISCUSSION DRAFT OF JUDGMENT AND DECREE**

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May 30, 2017

JUDGMENT¹

Judgment is awarded against the State of Wyoming and in favor of the State of Montana for violations of the Yellowstone River Compact resulting from Wyoming's reduction of the volume of water available in the Tongue River at the Stateline between Wyoming and Montana by 1300 acre feet in 2004 and 56 acre feet in 2006. Judgment is awarded in the amount of \$20,340, together with pre-judgment and post-judgment interest of seven percent (7%) per annum from the year of each violation until paid. Costs are awarded to Montana in the amount of \$67,270.87.

Commented [A1]: Montana is providing its response to Wyoming's redline changes to the Special Master's Discussion Draft of Judgment and Decree by means of comments in the margin of Wyoming's Word document. Wyoming's comments in the margin have been removed to avoid confusion, but Wyoming's proposed changes in redline to the text have been retained.

Wyoming shall pay these damages, interest, and costs in full not later than 90 days from the date of entry of this Judgment. Wyoming shall make its payment into an account specified by Montana to be used for improvements to the Tongue River Reservoir or related facilities in Montana. Montana may distribute these funds to a state agency or program, a political subdivision of the State, a nonprofit corporation, association, and/or a charitable organization at the sole discretion of the Montana Attorney General in accordance with the laws of the State of Montana, with the express condition that the funds be used for improvements to the Tongue River Reservoir or related facilities in Montana.

Except as herein provided, all claims in Montana's Bill of Complaint are denied and dismissed with prejudice.

DECREE

A. General Provisions

1. Article V(A) of the Yellowstone River Compact protects pre-1950 appropriative rights to the beneficial uses of water of the Yellowstone River system in Montana from diversions and withdrawals of surface water ~~and groundwater~~ in Wyoming, whether for direct use or storage,

¹ The Judgment and Decree follows the general form used in *Kansas v. Colorado*, 556 U.S. 98, 103-104 (2009).

that are not made pursuant to appropriative rights in Wyoming existing as of January 1, 1950.²

Article V(A) of the Compact also protects pre-1950 appropriative rights to the beneficial uses of water of the Yellowstone River system in Montana from groundwater production that interferes with the continued enjoyment those rights.

2. Article V(A) of the Compact apportions and regulates all surface waters tributary to the Tongue and Powder Rivers (with the exception of the explicit exclusions set out in Article V(E) of the Compact).³

3. Article V(A) of the Compact does not guarantee Montana a fixed quantity of flow of water, nor does it limit Wyoming to the net volume of water actually consumed in Wyoming prior to January 1, 1950.⁴

4. Article V(A) of the Compact protects pre-1950 appropriative rights only to the extent they are for “beneficial uses,” as defined in Article II(H) of the Compact, and are otherwise consistent in accordance with the doctrine of appropriation. In particular, pre-1950 rights are not protected to the extent they are wasteful under the doctrine of appropriation.⁵

Commented [A2]: Wyoming’s revisions to ¶A.1 are unnecessary and should be rejected. Wyoming is concerned that the language as drafted by the Special Master suggests that groundwater withdrawals are automatically violative of the Compact. This is not correct. As the Special Master has phrased it, Article V(A) “protects” the pre-1950 rights in Montana, both surface and groundwater. This in no way suggests that the exercise of surface rights or groundwater rights automatically violates the Compact. The language as proposed by the Special Master is perfectly suited to the purpose and should not be changed. Furthermore, Wyoming’s concern is addressed in a change to ¶B.7.

Commented [A3]: Montana does not object to removing the limitation to subsection A. In fact, subsection B allocates post-1950 rights, so the broadening of the reference to Article V would seem appropriate.

Commented [A4]: Montana opposes Wyoming’s suggestion that “apportions and regulates” be replaced by “allocates.” The language proposed by the Special Master is appropriate. This is because the Compact not only apportions surface waters, but also regulates those surface waters. Inclusion of “regulates” is appropriate because it recognizes that the Compact, as interpreted by the Special Master and the Court, requires regulation under the prior appropriation doctrine. An obvious example of regulation is the necessity for Montana to make a call and the necessity for Wyoming to respond to a call.

Commented [A5]: The Special Master’s formulation in terms of a “fixed flow” adequately expresses the intent of this provision. Wyoming’s concern about the ability of a water right owner in Wyoming to change irrigation methods, is addressed by the Special Master in ¶C.2, and does not need to be referenced here.

Commented [A6]: Montana sees no compelling reason to make the change suggested by Wyoming.

² Mont. A(1)(a); Wyo. II(E). I concluded that Wyoming’s additional language, “that prevent sufficient water from reaching pre-1950 appropriative rights in Montana when those rights are unsatisfied,” is unnecessary because it is implicit in the word “protect.” Protection is needed only from Wyoming diversions that injure pre-1950 rights in Montana. The Second Interim Report recognizes that liability under Article V(A) is subject to a “futile call” defense, but concludes that it is an affirmative defense on which Wyoming has the burden. See Second Interim Report, pp. 224-225.

³ Mont. A(7); Wyo. II(A). Wyoming proposed the verb “applies,” which is the verb used in p. 96 of the First Interim Report. Montana suggested that the verb “apportions” is clearer. “Apportions,” however, seems too limited because the Compact also regulates water use. I therefore have used the dual term “apportions and regulates.”

⁴ Mont. A(8), A(9); Wyo. II(B). Page 162 of the Second Interim Report states that Montana is not entitled to any “set flow” of water, but “fixed flow” seems a clearer term. While Montana suggests that the first half of this paragraph should affirmatively state how Montana’s water rights are protected, paragraph A(1) of my proposed Decree already does that. Adding anything additional here would seem either repetitive or potentially confusing. I similarly decided that Montana’s proposed addition to the second half of the paragraph (“so long as the pre-1950 water rights remain unchanged with respect to irrigated acreage, type of use, and location and capacity of diversion”) is unnecessary given the other provisions of this Decree (specifically ¶¶ C(2) and C(3)).

⁵ Mont. B(13); Wyo. II(G)(2nd sentence), II(G)(i). The paragraph avoids reference to “present administration of waste” (as Montana suggests it should), because I have not had any opportunity to evaluate current administration of water rights in Montana. The trial dealt only with administration in 2004 and 2006.

5. Except as otherwise expressly provided in this Decree or the Compact, ~~the laws of Montana's and Wyoming's state rules and regulations~~ (including rules for reservoir accounting) govern the administration and management of each state's respective water rights in the implementation of Article V(A) of the Compact.⁶

Commented [A7]: Montana does not oppose this change.

B. Calls

1. To protect pre-1950 appropriative rights under Article V(A) of the Compact, Montana must place a call. Wyoming is not liable for flow impacts that take place when a call is not in effect.⁷

2. Subject to paragraph B(3), Montana may place a call on the Tongue River whenever

(a) a pre-1950 direct flow right in Montana is not ~~receiving the water to which it is entitled/satisfied~~, or (b) Montana reasonably believes, based on significant evidence, that the Tongue River Reservoir might not fill ~~to capacity~~ before the end of the ~~calendar water~~ year.⁸

Commented [A8]: Wyoming's proposed change should be rejected. This change would place an additional burden on Montana that has not been endorsed by the Special Master. As the Wyoming comment indicates, Wyoming is suggesting that, in order to place a call, Montana must be able to show that the water will be put to beneficial use, not generally, but specifically at that "particular point in time." The language proposed by the Special Master, "receiving the water to which it is entitled," is parallel to the language in ¶ B.7, which allows pre-1950 appropriators in Wyoming to divert water "to the degree permitted by their appropriative rights and this decree." That is the functional equivalent of the language proposed by the Special Master for ¶ B.2, and the Special Master's language should be retained, in order to treat the two States equally on this point. Typical water administration allows water rights to divert up to their fully adjudicated or permitted amount.

3. Montana cannot place a call under Article V(A) when it can remedy shortages of pre-1950 appropriators in Montana through purely intrastate means that do not prejudice Montana's

Commented [A9]: Montana agrees with this suggestion.

⁶ Mont. B(16)-B(18), B(22); Wyo. II(I)(iv)-(v). This paragraph expressly provides that each state's reservoir accounting rules will apply to reservoirs within its borders. It thus implicitly incorporates Montana's proposed ¶ 22, which would have provided that Wyoming's Early-Fill Rule and Store-It-Or-Lose-It Rule do not apply to Montana reservoirs.

⁷ Mont. B(1); Wyo. II(I). The language of the second paragraph is meant to accomplish the same purpose as Wyoming's proposed paragraph II(I). Wyoming is not liable for flow levels if a call is not in effect. However, contrary to the language of Wyoming's proposed paragraph II(I), Wyoming has a general obligation to regulate and administer its water rights to avoid violating Article V(A).

⁸ Mont. B(1), B(6); Wyo. II(J)(i). In the case of proposed ¶ B(2)(b), no provision of the Compact sets out the type of flat rules, based purely on reservoir levels, suggested by Montana. Although clear, easy-to-apply rules for when Montana would make it easier for Montana to determine when it can make a call (and make it easier for Wyoming to determine whether a call is appropriate), the Compact provides for no basis for establishing any particular set of rules. The parties must adopt such rules either directly or through the Yellowstone River Compact Commission. However, the Compact also does not require Montana to have any *specific* evidence at the time that it makes a call, although a call must be *based on evidence that justifies Montana making a call*. Consistent with general contract rules, I have provided that Montana must "reasonably believe" that the Reservoir might not fill, "based on significant evidence." Although the formulation in this paragraph focuses on reasonable belief, the language is consistent with pages 78-79 (footnote 20) of the Second Interim Report, which notes that Montana can make a call when there is "significant evidence showing that, without more, the Reservoir might not fill."

other rights under the Compact.⁹ When making a call, Montana shall notify Wyoming of the intrastate actions it has taken to comply with this obligation, and when requested, provide Wyoming with reasonable documentation of these actions (including records of reservoir operations, commissioner reports, and field notes).

4. A call need not take any particular form, use any specific language, or be delivered by or to any particular official, but should be sufficient to place Wyoming on clear notice that Montana believes it needs additional water to satisfy its pre-1950 appropriative rights.¹⁰

5. A call is effective upon receipt by Wyoming and continues in effect until Montana notifies Wyoming that Montana is lifting the call.¹¹

6. Montana shall promptly notify Wyoming that it is lifting a call when (a) pre-1950 direct flow rights in Montana are receiving the water to which they are entitled satisfied, and or (b) Montana has reasonable grounds, based on significant evidence, to believe that the Tongue River Reservoir will fill to capacity before the end of the calendar water year. Montana may initiate place a new call at a later point if the conditions of paragraph B(2) are again met.¹²

7. Upon receiving a call, Wyoming shall promptly initiate action to ensure, to the degree physically possible, that only pre-1950 appropriators in Wyoming are diverting or withdrawing water and only to the degree permitted by their appropriative rights and this Decree, and that any

⁹ Mont. A(13); Wyo. II(G)(1st sentence), II(G)(ii). Although my wording is different from that suggested by Montana and Wyoming, this paragraph is meant to accomplish the same purpose. The placement of the paragraph here clarifies that the question of intrastate regulation arises when Montana is considering making a call. If intrastate remedies are sufficient, Montana cannot make a call. Conversely, when intrastate remedies are not sufficient, the appropriate remedy is a call. I have not included the second sentence of Montana's proposed ¶ A(13) ("Where this is not possible ..."), which is duplicative of ¶ B(7) in this Decree that requires Wyoming to avoid interferences with Montana's pre-1950 rights when a call is in effect.

¹⁰ Wyo. II(H). The operative language in this language comes from p. 61 of the Second Interim Report. The Second Interim Report is clear that a call does not need to include a request that "Wyoming regulate its post-1950 appropriative rights for the benefit of Montana's pre-1950 appropriative rights" (see p. 59), as Wyoming's language would suggest, although Montana would be wise to include such language in future calls for total clarity.

¹¹ Mont. B(8)(3rd & 4th sentences).

¹² Mont. B(6), B(11). The Compact provides no basis for requiring Montana to lift a call within any set period of time. The proposed language therefore requires Montana to provide "prompt" notification rather than notification within two business days.

Commented [A10]: Wyoming's new language should be rejected for three reasons.

First, this change would appear to place an additional condition on Montana in order for Montana to enjoy its rights under the Compact. Wyoming seems to be suggesting that additional information would be required before Wyoming would honor a call. This is contrary to other provisions in the decree, such as ¶ B.2 and B.7. In its comment, Wyoming says: "Wyoming will continue to ask for this information every time Montana makes a call." Wyoming seems to be suggesting that it will continue its earlier practice of being slow or unwilling to comply with a call until it has received what it considers adequate information. See, e.g., Op. of Special Master on Remedies 28-30.

Second, such a condition is unnecessary. When the Tongue River Reservoir has not filled its pre-1950 right, the need for an interstate call is clear, given its location just below the Stateline, and no additional information is necessary. A shortage for direct flow rights is established upon the release of contract water for pre-1950 water users.

Third, Wyoming's proposed language should be rejected for the independent reason that it is inconsistent with the Second Interim Report. "If Wyoming believes that Montana had other means, including intrastate regulation of post-1950 users to remedy its shortage, Wyoming has the burden of proving it." SIR 223.

Commented [A11]: Montana agrees with this suggested change and the comment of Wyoming on it: "It is probably best to avoid words that suggest a state of mind." This admonition by Wyoming is well taken. The prior appropriation doctrine does not depend in general on an appropriator's state of mind on a particular day, but rather on whether that appropriator is receiving the water to which he is entitled. This principle is also helpful in explaining why the Special Master's reliance on Montana's state of mind in ¶ B.2 is misguided. Whether Montana can make a call based on its Tongue River Reservoir right should depend only on whether the Reservoir has filled its pre-1950 storage right or not. It should not depend upon Montana's state of mind. Indeed, how a State's state of mind is determined under these circumstances is open to question and will likely be fertile ground for further disputes between the States. It should be noted that rights under the prior appropriation doctrine are not typically based on intent, as in contract law. Prior appropriation water rights are not based on agreement with other water users, but on actions taken independently by different water users. Thus, when exercising an appropriative right, the water right holder, in or ... [1]

Commented [A12]: See MT. comment 8 at ¶ B.2 above.

Commented [A13]: Wyoming's change should be rejected. If the separation of direct flow calls and reservoir calls is maintained here and in ¶ B.2, the conjunction here should be "and," not "or." Wyoming's suggestion seems to be based on the notion that, if a call is based on one right, and that right begins to receive all of the water to which it is entitled, that the call must be reinitiated for the other rights that are not receiving their water to which they are entitled ... [2]

Commented [A14]: Montana agrees with this suggestion.

Commented [A15]: Montana sees no compelling reason for the change suggested by Wyoming.

Commented [A16]: Montana recommends rejecting this deletion and adding "storing." See Montana's Comments on the Special Master's Discussion Draft of Judgment and Decree (May 22, 2017) ¶ B.7 n. 6.

Commented [A17]: This change should be rejected. Removing "and only" might be understood to loosen the Compact requirement that Wyoming limit itself strictly to its pre-1950 rights when a call is in effect.

groundwater withdrawals under post-1950 appropriative rights are not interfering with the continued enjoyment of pre-1950 surface rights in Montana. Wyoming shall be liable for

Commented [A18]: Montana does not object to this change.

diversions or withdrawals in violation of Article V(A) of the Compact even if it was not possible for Wyoming to prevent the diversions or withdrawals. Wyoming shall notify Montana of the actions that it is taking and, when requested, provide Montana with reasonable documentation of these actions (including records of reservoir operations, hydrographer reports, and field notes).¹³

C. Pre-1950 Appropriative Rights in Wyoming

1. The Compact assigns the same seniority level to all pre-1950 water users in Montana and Wyoming. ~~Except as otherwise provided in this Decree, T~~the exercise of pre-1950 appropriative rights in Wyoming does not violate the Compact rights of pre-1950 appropriative rights in Montana.¹⁴

Commented [A19]: Montana objects to the removal of this proviso, but it may be appropriate to reformulate the proviso to read, "So long as the requirements of this Decree are met."

2. Article V(A) does not prohibit Montana or Wyoming from allowing a pre-1950 appropriator to conserve water through the adoption of improved irrigation techniques and then use that water to irrigate the lands to which the specific pre-1950 appropriative rights attaches, even when the increased consumption interferes with pre-1950 uses in Montana. Article V(A) protects pre-1950 appropriators in Montana from the use of such conserved water in Wyoming on lands to which the specific pre-1950 appropriative right does not attach, or on new lands or

Commented [A20]: Montana agrees.

Commented [A21]: Montana objects to this suggestion. The language chosen by the Special Master matches the language in Article V(B) in the Compact and is therefore presumptively acceptable. The language as proposed by the Special Master may also help ensure that pre-1950 rights in Wyoming are not expanded.

¹³ Mont. B(7), B(9), B(1). The proposed language recognizes that Wyoming may not be able to physically prevent some post-1950 uses in the case of a call (e.g., if snow prevents Wyoming from releasing water from post-1950 reservoirs that are accumulating water). However, the language also provides that any Wyoming remains liable to Montana in such cases. The proposed language seeks also to set out Wyoming's requirements without reference to terms such as "adjudicated amounts" that could lead to disagreement and controversy. Finally, while requiring Wyoming to notify Montana of the actions that it is taking (which are implicit in the Compact requirements), the Decree does not incorporate specific timing requirements not found in the Compact (e.g., a requirement that Wyoming notice Montana of its actions within two business days or that documentation be furnished within ten business days).

¹⁴ Mont. A(10); Wyo. II(C). The second sentence makes clear that the exercise of pre-1950 rights in Wyoming does not violate Article V(A) *except as otherwise provided in the Decree*.

for new purposes. Such uses fall within Article V(B) of the Compact and cannot interfere with pre-1950 appropriative rights in Montana.¹⁵

3. Pre-1950 appropriators in Montana and Wyoming may change their place of use, type of use, and point of diversion pursuant to applicable state law, so long as any such changes ~~in Wyoming do not injure appropriators in the other State~~ prevent sufficient water from reaching pre-1950 appropriative rights in Montana when those rights are unsatisfied.¹⁶ ~~Once such a change is permitted, that changed right has all the attributes of and is entitled to the same protections as any other pre-1950 appropriative right and the appropriator is entitled to exercise that right to the full extent permitted under the Compact.~~

Commented [A22]: Montana does not object to this change.

Commented [A23]: Montana objects to this new sentence. It presumes that Montana and the Supreme Court must acquiesce in any change permitted by Wyoming authorities. If adopted, it might be read to preclude challenges to Wyoming's unilateral judicial and administrative decisions. *See Kansas v. Colorado*, 543 U.S. 86, 103-104 (2004) ("This is not to say, however, that the Colorado Water Courts are empowered to make a final determination on any matter essential to compact compliance at the Stateline, or that Colorado's reliance on such Water Court actions will necessarily satisfy its compact obligations. . . . All replacement credits, no matter how determined, are subject to the right of Kansas to seek relief under the Court's original jurisdiction").

D. Wyoming Storage Reservoirs

1. Under Article V of the Compact, post-1950 appropriators in Wyoming may not store water when the water is needed to satisfy pre-1950 appropriative rights in Montana and Montana has ~~issued~~ placed a call. Post-1950 appropriators in Wyoming may store water during periods when Montana has not made a call.¹⁷

Commented [A24]: Montana sees no reason to make this change.

2. Water stored under post-1950 appropriative rights in Wyoming when a call is not in effect has been legally stored under the Compact and can be subsequently used at any time,

¹⁵ Mont. A(3). As discussed in the textual box, I have revised part of Montana's proposed language to better reflect the limits of where conserved water can be used. Both parties are free to suggest alternative language if they believe that my language is inaccurate.

¹⁶ Mont. A(1)(c), A(11), A(12); Wyo. II(D). Wyoming's proposed language that changes are permitted "within the legal parameters of the appropriative rights" is ambiguous and overly broad. As Montana suggests, this language could be read to permit changes that would injure pre-1950 appropriative rights in Montana in violation of Article V(A). The new language makes it clear that changes are permitted under Wyoming law, but not if they would injure pre-1950 appropriators in Montana. This is consistent with standard prior appropriation doctrine and the analysis in the First Interim Report (see pp. 66-71). This paragraph therefore incorporates the substance of Montana's proposed ¶ A(1)(c), A(11), and A(12).

¹⁷ Mont. A(1)(b), A(1)(d); Wyo. II(I)(i). I have not included the language of Montana's proposed ¶ A(1)(d) because, although it comes from page 89 of my First Interim Report, I do not believe that the language adds anything to the simple requirement that "post-1950 appropriators in Wyoming may not store water when the water is needed to satisfy pre-1950 appropriative rights in Montana and Montana has issued a call." Indeed, the language seems unnecessarily confusing when included in the Decree (versus in the context of the First Interim Report). Montana, however, is free in its comments to explain why its language has independent significance.

including when pre-1950 appropriative rights in Montana are unsatisfied. The Compact does not require Wyoming to release such water to Montana in response to a call.¹⁸

E. Tongue River Reservoir

1. Article V(A) protects Montana's right to store up to, but not more than, 72,500 acre feet of water in the Tongue River Reservoir, less carry-over storage as of October 1 of the water year. If the Tongue River Reservoir begins the water year on October 1 with over 6,571 acre feet of carryover water, Article V(A) protects Montana's right to fill the Tongue River Reservoir to its current capacity of 79,071 acre feet.¹⁹

2. Montana must avoid wasting water in its operation of the Tongue River Reservoir by not permitting outflows during winter months that are not dictated by good engineering practices. Any wasteful outflows shall equally reduce the amount of water storage protected under Article V(A) for that water year.²⁰

3. The reasonable range for winter outflows from the Tongue River Reservoir is 75 to 175 cubic feet per second. The appropriate outflow at any particular point of time varies within this range and depends on the specific conditions, including the needs of downstream senior water appropriative rights and risks such as ice jams and flooding. Montana enjoys significant discretion in setting the appropriate outflow within this range and in other reservoir operations.²¹

F. General Reservoir Rules

1. Article V(A) of the Compact does not protect water stored exclusively for non-depletive purposes, such as hydroelectric generation and fish protection.²²

¹⁸ Mont. A(2); Wyo. II(I)(ii), II(I)(iii).

¹⁹ Mont. A(5); Wyo. II(J).

²⁰ Wyo. II(J)(ii). I have tried refining the language so that the exact requirements are clearer.

²¹ Mont. B(12), B(20); Wyo. II(J)(iv). The paragraph is different than those suggested by either Montana or Wyoming, but is consistent with the language at pages 153-154 of the Second Interim Report.

²² Wyo. II(J)(iii). I have refined the language and made it more general. Montana argues that Wyoming's proposed language does not address an issue that has arisen in the case and is unlikely to become a matter of dispute in the

2. Montana and Wyoming must operate and regulate reservoirs on the Tongue River in a fashion that is generally consistent with the appropriation laws and rules that govern similar reservoirs elsewhere in each respective state.²³

3. Reservoirs on the Tongue River in Montana or Wyoming cannot substantially change their operating procedures in a way that causes injury to appropriative rights in the other state.²⁴

G. Information

~~1. Appendix A to this Decree lists Montana's pre-1950 water rights in the Tongue River basin that are protected by Article V(A) of the Compact.²⁵~~

~~2. Appendix B to this Decree lists Wyoming's current post-1950 water rights in the Tongue River basin.²⁶~~

~~3. Montana and Wyoming shall exchange information, as reasonable and appropriate, relevant to the effective implementation of Article V(A) of the Compact. In particular, Montana and Wyoming will keep each other informed of any changes in the water rights listed in Appendices A and B. Montana and Wyoming also shall provide the other State annually with any data available in the ordinary course of water administration that shows the amount and location of groundwater pumping in the Tongue River and Powder River basins. The~~

future. I did address the issue at page 111 of my Second Interim Report, however, and the proposed language would seem undeniably consistent with the Compact. The issue also arose in the first phase of the case, albeit in connection with the legitimacy of winter *outflows* for fish protection purposes. At the same time, I agree that the Decree should not address purely hypothetical issues that are unlikely to arise in the near future. Montana therefore is free to renew its objection to this language if it wishes in its comments on this proposed Decree (and Wyoming is then free to respond as to why the provision should be included).

²³ Wyo. II(J)(v). This paragraph incorporates the principle set out at page 154 of the Second Interim Report. However, I have broadened the provision to apply to both Montana and Wyoming, since the principle should apply under the Compact to both states.

²⁴ Wyo. II(J)(vi). This paragraph incorporates the principle set out at pages 154-155 of the Second Interim Report. However, I have broadened the provision to apply to both Montana and Wyoming, since the principle should apply under the Compact to both states.

²⁵ ~~Mont. A(4). Appendices that list key data for implementing a compact or decree are appropriate and have been used by the Supreme Court in previous decrees.~~

²⁶ ~~Mont. A(6). As just noted, appendices that list key data for implementing a compact or decree are appropriate and have been used by the Supreme Court in previous decrees. After reviewing the briefs of both Montana and Wyoming, I also was not convinced that compiling this appendix would be a significant burden on Wyoming.~~

~~Yellowstone River Compact Commission remains free to modify or supplement the terms of this paragraph pursuant to its authority under the Compact.²⁷~~

Commented [A25]: Wyoming's suggested changes to Section G should be rejected. Montana agrees with the inclusion of Section G in its entirety for the reasons stated by the Special Master. Doing so will help to avoid future disputes by providing for an exchange of information that will allow potential disputes to be noticed early and more likely resolved before they become large issues. Minimizing future disputes between the States is a major objective of the Compact and of the Court in enforcing compacts. See Yellowstone River Compact, 65 Stat. 663 (1951) ("[The States] being moved by consideration of interstate comity, and desiring to remove all causes of present and future controversy."); *Kansas v. Nebraska*, 574 U.S. _____. 135 S.Ct. 1042, 1053 (2015). ("We may not 'order relief inconsistent with [a compact's] express terms.' But within those limits, the Court may exercise its full authority to remedy violations of and promote compliance with the agreement, so as to give complete effect to public law." (citation omitted)).

H. Rights of the Northern Cheyenne Tribe

Nothing in this Decree addresses or determines the water rights of any Indian Tribe or Indian reservation or the status of such rights under the Yellowstone River Compact.²⁸

I. Retention of Jurisdiction


Any of the parties may apply at the foot of this Decree for its amendment or for further relief. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as it may from time to time deem necessary or desirable to give proper force and effect to this Decree.²⁹

Respectfully submitted,

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~~²⁷ Mont. B(14), B(15). Courts have frequently found that contracts include implied terms designed to allow for the reasonable implementation and enforcement of the contracts. The terms of this paragraph are consistent with such implied terms. Wyoming has not shown that the requirements set out in this paragraph would be onerous for it to implement (but is free to make such a case in its comments on the proposed Decree). The paragraph allows the Compact Commission to establish alternative procedures.~~

²⁸ Mont. C. The paragraph uses the language at pp. 159-160 of my Second Interim Report.

²⁹ Mont. D. As Montana notes, provisions of this nature are normally included in decrees in original jurisdiction cases before the United States Supreme Court. Continuing disagreements among the parties also militates for continuing jurisdiction.

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Before the Honorable Barton H. Thompson, Jr.
Special Master
◆

CERTIFICATE OF SERVICE

I certify that copies of Montana's Response to Wyoming's Comments on the Special Master's Discussion Draft of Judgment and Decree was served electronically and by U.S. Mail to the following on May 30, 2017, as indicated below:

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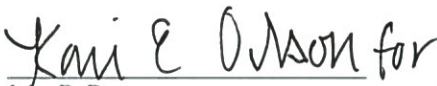
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John B. Draper

Montana agrees with this suggested change and the comment of Wyoming on it: “It is probably best to avoid words that suggest a state of mind.” This admonition by Wyoming is well taken. The prior appropriation doctrine does not depend in general on an appropriator’s state of mind on a particular day, but rather on whether that appropriator is receiving the water to which he is entitled. This principle is also helpful in explaining why the Special Master’s reliance on Montana’s state of mind in ¶ B.2 is misguided. Whether Montana can make a call based on its Tongue River Reservoir right should depend only on whether the Reservoir has filled its pre-1950 storage right or not. It should not depend upon Montana’s state of mind. Indeed, how a State’s state of mind is determined under these circumstances is open to question and will likely be fertile ground for further disputes between the States. It should be noted that rights under the prior appropriation doctrine are not typically based on intent, as in contract law. Prior appropriation water rights are not based on agreement with other water users, but on actions taken independently by different water users. Thus, when exercising an appropriative right, the water right holder, in order to make a call, need only notify the junior appropriator of the senior’s need for water. As Wyoming suggests, it is probably best to avoid words that suggest a state of mind in making a call. *See also* Montana’s Comments on the Special Master’s Discussion Draft of Judgment and Decree (May 22, 2017).

Wyoming’s change should be rejected. If the separation of direct flow calls and reservoir calls is maintained here and in ¶ B.2, the conjunction here should be “and,” not “or.” Wyoming’s suggestion seems to be based on the notion that, if a call is based on one right, and that right begins to receive all of the water to which it is entitled, that the call must be reinitiated for the other rights that are not receiving their water to which they are entitled. This condition has not been part of the call requirements adopted by the Special Master, nor should it be.